Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

CONRAD MOCK and BARBARA MOCK,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is categorical treatment of regulatory action which denies all economically beneficial or productive use of land appropriate for "as applied" as well as facial takings challenges under the Fifth Amendment?

2. Where property owners produce uncontroverted evidence that denial of a permit has rendered a property valueless, does the government bear the burden of presenting evidence of practicable and reasonably probable uses in order to avert a taking?

3. Where denial of a permit has rendered property valueless, does the Pennsylvania courts' requirement that property owners must affirmatively foreclose all possibility of alternative use, however speculative, vitiate the Fifth Amendment guarantee against takings without just compensation?

4. Are the landowners' investment-backed expectations to be considered in cases of categorical regulatory takings, and if so, were those expectations of petitioners frustrated by their inability to develop commercially zoned property because of wetlands restrictions enacted long after the property was purchased?

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The order of the Supreme Court of Pennsylvania, affirming the order of the Commonwealth Court of Pennsylvania, is reported at 667 A.2d 212 and is reprinted in the appendix hereto, p. 1a, *infra*.

The order and opinion of the Commonwealth Court of Pennsylvania are reported at 154 Pa. Cmwlth. 380 and at 623 A.2d 940, and are reprinted in the appendix hereto, p. 3a and p. 4a, *infra*, with the dissenting opinion of Judge Kelley at p. 27a.

The adjudication and order of the Commonwealth of Pennsylvania Environmental Hearing Board have not been reported. They are reprinted in the appendix hereto, p. 30a, *infra*, with the concurring opinion of board member Terrence J. Fitzpatrick at p. 60a.

The letter of the Bureau of Dams and Waterway Management, Commonwealth of Pennsylvania Department of Environmental Resources, denying petitioners' encroachment permit application is reprinted in the appendix hereto, p. 63a, *infra*.

STATEMENT OF JURISDICTION

The petitioners, Conrad Mock and Barbara Mock, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on November 22, 1995, affirming the order entered with opinion by the Commonwealth Court of Pennsylvania. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Conrad and Barbara Mock are part-owners of a 5.2- acre tract purchased in February of 1963 as a long-term investment. The property is on the east side of Easton Road (U.S. Route 611) just north of Doylestown, in Plumstead Township, Bucks County, Pennsylvania. The Pine Run Creek runs roughly parallel to the northern boundary of the property. The property is located in an area designated as a C-2 Highway Commercial District by the July 1989 Zoning Ordinance of Plumstead Township. In the C-2 Highway Commercial District, a wide variety of commercial uses, including an automobile repair facility, are permitted.

The surrounding properties are highly developed with commercial and industrial establishments, including a tire store located south of the property; a concrete plant to the east; a medical facility north of the property; and automobile dealerships and banks located to the west across Route 611. The medical facility was constructed on totally filled wetlands after petitioners had purchased their property. Petitioners' property is the only undeveloped land in the immediate vicinity.

Of the 5.2 acres which comprise the property, approximately 3.94 acres are wetlands. There are only two upland areas, which are located in the southeast (front) and southwest (rear) corners. Together, these upland areas comprise approximately 1 1/4 acres. In 1979, Petitioners applied to the Pennsylvania Department of Environmental Resources ("DER") for a permit authorizing a retaining wall along the Pine Run Creek and approval to fill behind it to a height above the 100-year flood elevation. The project would have filled in all of the wetlands on the property. DER issued a letter accepting the calculations and methodologies but stating that permits would not be issued until land development was imminent.

In 1985, petitioners entered into an agreement of sale with Midas Realty Corporation to convey the property to Midas for $175,000, but the sale was contingent upon Midas' ability to secure all necessary permits and approvals for constructing and operating a Midas Muffler shop. On February 11, 1986, Midas filed an application with DER for a Water Obstruction Permit authorizing fill on a portion of the property to facilitate the construction of the proposed Midas Muffler shop and its attendant parking facilities. Submitted with the Midas application was a report containing calculations which showed that stormwater run-off and the 100-year floodplain elevations of the Pine Run Creek would not be increased by the project. The Midas project satisfied Plumstead Township's standards for stormwater management and floodplain use and the standards of the Bucks County Conservation District for erosion and sedimentation control. Because of opposition from DER and the U.S. Army Corps of Engineers to the filling of wetlands, however, Midas decided to discontinue its permit application, and DER never took any action with respect to that application.

After the Midas sale fell through, petitioners decided to pursue the development of the property themselves. They proposed to construct an automobile repair facility, a permitted use in the C-2 zoning district. They prepared a site plan utilizing basically the same design as the earlier project proposed by Midas.

On July 11, 1988, petitioners filed a permit application with DER and the Army Corps of Engineers, seeking authorization to fill .87 acres of wetlands. The fill was required to provide sufficient developable area adjacent to the upland frontage along Route 611 for construction of an automobile repair facility. The application proposed filling an area approximately 150 feet wide by 240 feet long, lying between the two upland areas on the property; construction of a 5,000-square-foot building and 37

parking spaces on the newly filled area; construction of a stormwater detention basin on the rear upland area; extension of a 36-inch reinforced concrete pipe; and installation of an outlet structure near Easton Road. In addition, in order to compensate for the wetland fill, petitioners proposed a .38-acre wetland creation area in the rear upland section.

In their proposal, petitioners considered whether a facility might be located in the rear upland corner; however, this alternative was simply not feasible. As set forth in their Comprehensive Environmental Analysis:

> The alternative of pushing the facility to the southeast corner of the tract where a larger portion of non-wetland area exists was considered and found less desirable to the present alternative for the following reasons: The area is currently steeply sloped and would also require substantial fill material in the wetland area. The access road would also have to be lengthened across the wetland area. The detention facility would still be required and would have to be constructed in the wetland area. In short, approximately equal amounts of disturbance to the wetland area would exist while moving the facility further back into the wildlife area (U.S. Army Corps of Engineers consideration) and further away from the patrons being served.

DER denied the permit application and the Mocks appealed to the Environmental Hearing Board ("EHB"). Hearings were held before Administrative Law Judge Robert D. Myers on July 9 and 10, 1991. The issues raised on the appeal were whether DER's denial of the permit application was proper, and, if it was,

whether the denial of the permit application effected a taking under the Fifth Amendment to the United States Constitution and article 1, section 10 of the Pennsylvania Constitution.

The EHB concluded that DER had properly denied the permit application. On the taking issue, after considering all of the testimony, the Board found: "The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 (the amount offered by Midas) or more."

The EHB accepted petitioners' proofs that construction on the rear upland area was not practical. In addition, the EHB found that the DER had not even challenged petitioners' proofs that no other permitted uses would have a lesser impact on the site's wetlands. Notwithstanding these findings of fact, the Board concluded that DER's action in denying the requested permit to fill .87 acres of wetlands did not effect a taking of all or of a portion of the property.

At odds with the EHB's conclusion is the unrebutted testimony of Russell Benner, petitioners' registered professional engineer, unchallenged by DER, that there were no other uses permitted by the zoning ordinance which would involve a lesser impact on the wetlands portion of the property than the proposed automobile repair facility. Rather, according to EHB, "common sense" suggested that some other permitted use involving less wetlands could be built on the site. The Board further speculated that any reduction in the size of the project which would reduce the amount of wetlands to be affected might induce DER to issue a permit, and thus ignored the testimony of DER representatives that any new permit application to fill wetlands on petitioners' property would have been futile. Richard Shannon, who reviewed the Mocks' application for DER testified:

Q. And isn't the location of the project off-site one of the factors that you believe has to be taken into account in terms of mitigation as it is defined in the regulatory sense?

A. Yes.

Q. Under what circumstances, then, in a non-water dependent project would you permit the intrusion upon wetlands?

A. Where there are no practicable alternatives to locating that project at that site.

Q. Do you mean where it's not practicable to locate it off-site in some other location?

A. Yes.

Q. So, in the case of Mr. Mock, I take it that you concluded that there is some off-site location at which an automobile facility can be located, for example, virtually any other place in the Doylestown area, correct?

A. Yes.

Q. And consequently, under no circumstances would you permit any filling of wetlands because one could mitigate by going somewhere else to a different site?

A. Essentially, yes. The Mocks never provided me any documentation indicating that this facility could not go at another site.

The EHB adjudication was issued prior to the decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

Petitioners filed a petition for review with the Commonwealth Court of Pennsylvania. In its majority opinion, the court considered *Lucas* and declined to apply its constitutional standard for determining whether the permit denial was a regulatory taking, despite finding substantial evidence to support the EHB's conclusion that the property was valueless in its present condition. The Commonwealth Court further saw fit to repair to "traditional" takings analysis, and opined that since the Mocks did not prove what their plans were on the purchase in 1963, the permit denial did not interfere with their investment backed expectations. Judge Kelley of the Commonwealth Court dissented and filed a separate opinion finding a taking under *Lucas*.

Petitioners then sought review by the Supreme Court of Pennsylvania. The appeal was allowed and oral argument was heard. On November 22, 1995 the Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in a *per curiam* order.

REASONS FOR GRANTING THE WRIT

I.

THE PENNSYLVANIA COURTS HAVE DECLINED TO FOLLOW THIS COURT'S STANDARD FOR DETERMINING CATEGORICAL TAKINGS OF PROPERTY RENDERED VALUELESS BY THE DENIAL OF A WETLANDS FILL PERMIT, CONTRARY TO *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

As the Court stated in *Lucas v. South Carolina Coastal Council:* "When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U.S. at __, 112 S. Ct. at 2895, 120 L. Ed. 2d 798. It is well established that regulatory action is compensable without case-specific inquiry into the public interest advanced in support of the restraint when regulation on its face denies all economically beneficial or productive use of land. *See Agins v. Tiburon,* 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). However, the Commonwealth Court refused to apply this categorical analysis to petitioners' "as applied" takings challenge to DER's denial of a fill permit, even though the court found substantial evidence to support the EHB's finding that the property was presently valueless. The stated reason (pp. 16a-17a, *infra*):

> The state statute in *Lucas* prohibited all permanent development on the property in question, but the department's action with respect to the Mocks only denied the specific project under consideration. In this case, neither the Act nor the department's regulations prohibit the filling of wetlands,

> nor did the department's permit denial prohibit all construction on the Mocks' land.

Accordingly, the Pennsylvania courts below would not recognize a categorical taking in the absence of a facial and total statutory prohibition of economically viable use. This case presents the Court with the opportunity to clarify that categorical takings are not so restricted and may occur in the present context where a permit denial renders property valueless.

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit applied the categorical rule espoused in *Lucas* to find that a total taking was effected by the Army Corps of Engineers' denial of a permit to fill 12.5 acres of wetlands under section 404 of the Clean Water Act. The Federal Circuit succinctly characterized the law of regulatory takings after *Lucas* as follows:

> (a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
>
> (b) With regard to the interest alleged to be taken, there has been a regulatory taking if
>
> > (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> >
> > (2) the property owner had distinct investment-backed expectations; and

> (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Id. at 1179. The Federal Circuit sustained the trial court's determination that there had been a denial of economically viable use of the land by comparing the value of the 12.5 acre parcel before and after the regulatory imposition, and the conclusion that the 99% diminution of value from $2,658,000 to $12,500 amounted to a total taking of the property owner's interests in the parcel. *See id.* at 1175, 1178. The Federal Circuit thus affirmed the judgment that Loveladies Harbor had suffered a regulatory taking of the 12.5-acre parcel.

In its adjudication of petitioners' takings claim, the EHB found that the property, without a permit to fill in a portion of the wetlands, was essentially valueless, and noted that with such a permit, the site could have a value of $175,000 — the amount offered by Midas — or greater. But contrary to the Federal Circuit's opinion in *Loveladies Harbor,* the Pennsylvania courts made a radical retreat from *Lucas* and held that this was not enough for a categorical taking.

Following *Lucas,* the EHB's finding that the property was rendered valueless categorically entitled petitioners to compensation, unless the proscribed use interests were not part of their title to begin with, 505 U.S. at __, 112 S. Ct. at 2899, 120 L. Ed. 2d 798; that is, if DER could "identify background principles of nuisance and property law that prohibit the uses" intended "in the circumstances in which the property is presently found." *Id.* at __, 112 S. Ct. at 2901-02, 120 L. Ed. 2d 798. Indeed, the Pennsylvania courts did not consider this final point, because they short-circuited the takings analysis by ignoring the

determination that the absence of a fill permit left the property essentially valueless.

II.

PENNSYLVANIA HAS SOUGHT TO AVOID THIS COURT'S CATEGORICAL TAKINGS RULE BY IMPOSING ON THE PROPERTY OWNER AN UNCERTAIN AND POTENTIALLY INTERMINABLE BURDEN OF EXCLUDING ALL ECONOMICALLY VIABLE USE IN THE PERMIT APPLICATION PROCESS.

According to the majority opinion of the Commonwealth Court, petitioners could not succeed on their taking claim unless and until they exhausted any number of alternative proposals for construction on the property, even though DER acknowledged that no alternative plan would be acceptable to it, let alone restore economic value to the property.

Initially, DER suggested that the Mocks could develop the site as a wetlands nursery, but of course could not show that this would have any economic value. The DER also suggested that the Mocks should develop only the uplands at the rear corner of the parcel, most distant from the Easton Road frontage. Access to the highway could be obtained via a road on adjoining property, but that adjoining property owner refused permission. Or, according to DER, petitioners could build a bridge over the wetlands. Rejecting DER's approach, the EHB expressly accepted petitioners' unrebutted showing that development of the rear uplands area was not practical.

The Commonwealth Court further speculated that DER's denial of a permit for the proposed auto repair facility did not foreclose some other development of the property which may not require filling of wetlands in the same amount or location. The

Commonwealth Court expected the property owners to bear the burden of establishing "the impossibility" of using the property for any number of uses in the C-2 Highway Commercial District: museums, libraries. hospitals, nursing homes, medical and other office buildings, recreational and municipal facilities, service and retail shops, and restaurants.

Notwithstanding the unfairness inherent in requiring the property owner to prove the negative in a potentially interminable series of permit applications before a taking might arise, the exercise would prove nothing further in this case because DER had made it clear that no intrusion on wetlands of any kind would be permitted as long as the project — whatever it was — could be located virtually any other place in the Doylestown area. As it was, petitioners' proposal for a 5,000 square foot building and 37 parking spaces was quite modest for the 5.2 acre tract (with .38 acres to be dedicated as wetland replacement). Any application for a smaller project design would have been futile because the DER would require it to be located at some other site in the area. Moreover, as found by the EHB, DER left unchallenged petitioners' proofs that no other permitted use would have a lesser wetland impact.

Attempting to explain away the EHB's factual conclusions, the Commonwealth Court held (p. 17a, *infra*):

> The import of the Board's finding that the land in its current state is valueless, is simply that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

In the absence of a common law nuisance, the true legal import of the Board's finding that the land is presently valueless is that there has been a regulatory taking, and that petitioners are entitled to a monetary recovery for the value of the land.

III.

IN THE CONSTITUTIONAL DETERMINATION OF ECONOMICALLY VIABLE USE, THE BURDEN OF PRODUCTION MUST BE SHIFTED TO THE GOVERNMENT ONCE THE LANDOWNERS HAVE SUBMITTED UNREBUTTED EVIDENCE THAT THEIR PROPERTY IS VALUELESS.

Loveladies Harbor rejected the government's contention that the property owners had to apply for a permit to fill a lesser area before they could demonstrate that there are no remaining economically viable uses. As in the present case, the property owners established that further applications would have been futile, and the owners were entitled to a presumption that there were no economically viable uses, and that the burden is on the government to prove otherwise. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 157-58 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). The EHB relied on its "common sense" that the Mocks could have submitted some proposal with a lesser impact. As recognized in *Loveladies Harbor*: "Common sense, however, indicates the impossibility of requiring the plaintiff to prove a negative." *Id.* at 157.

At the EHB hearing, petitioners presented sufficient evidence to be entitled to judgment as a matter of law; the EHB in fact decided that the land in its current state has been rendered valueless. Thence, the burden of production should shift to the government. *Id.* at 158; C. McCormick, *McCormick on Evidence*

§ 338 (3d ed. 1984). DER offered no proof of any alternative uses and instead relied on its misperception that the property owners bore the entire burden of proof and persuasion.

In regulatory takings cases, once the plaintiff presents sufficient and unrebutted evidence so as to be entitled to judgment as a matter of law that they have been deprived of all economically viable use of the property, the burden of presenting sufficient evidence to the contrary must pass to the government. Furthermore, the government must then demonstrate practicable and reasonably probable uses, and the finder of fact must discount any proposed uses that do not meet a "showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a demand for such use in the reasonably near future." *Loveladies Harbor*, 21 Cl. Ct. at 158 (quoting *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938, 101 S. Ct. 2017, 68 L. Ed. 2d 324 (1981)); *see Olson v. United States*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934). If the government does not meet the *Olson* standard of reasonable probability for adaptability and demand in the market, the regulatory intrusion will have rendered the parcel without economically viable use.

The opinion of the Claims Court in *Loveladies Harbor* foreshadowed Justice Scalia's observation in *Lucas* that the takings analysis "presumes the unconstitutionality of state land-use regulations only in the sense that any rule-with-exceptions presumes the invalidity of a law that violates it — for example, the rule generally prohibiting content based restrictions on speech." 505 U.S. at __ n.6, 112 S. Ct. at 2893 n.6, 120 L. Ed. 2d 798. The government cannot constitutionally escape a finding that a taking has occurred for all practical purposes by leaving the property owner with an interminable burden of pursuing applications for smaller projects. In the wetlands context, once

the property owner proves that a denial of an otherwise lawful project has rendered a property valueless, it is incumbent on the government to show that there are reasonably probable alternative uses to establish that the property retains economic use, much as the Court has required the government to bear the burden of showing rough proportionality between a permit condition and the impact of the owner's proposed development in order to avoid takings liability. *Dolan v. City of Tigard*, __U.S.__, 114 S. Ct. 2309, 2319-20, 129 L. Ed. 2d 304 (1994). Burden shifting is necessary if the Fifth Amendment guarantee is to have meaning.

The effect of the opinions below is to deny a regulatory takings claim unless and until the property owner forecloses all alternative uses in any number of reapplications, even though the uncontroverted evidence admits only of the conclusion that no other project would be acceptable.

IV.

THE PENNSYLVANIA COURTS HAVE SKEWED THE TAKINGS ANALYSIS TO DENY JUST COMPENSATION BY CONFUSING THE SUBSTANTIVE DETERMINATION OF ECONOMICALLY VIABLE USE WITH THE RIPENESS REQUIREMENT.

Whether the property owner is required to submit alternative applications containing less ambitious proposals in a given case is a factor in determining not whether the property owner has been deprived of all economically beneficial use, but rather whether the taking claim is sufficiently ripe for litigation in the first instance. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9, 106 S. Ct. 2561, 2569 n.9, 91 L. Ed. 2d 285 (1986).

In reaching the merits, the Pennsylvania courts were satisfied that petitioners had made a sufficiently meaningful application for the fill permit, and there was no question that the takings claim was ripe for adjudication. However, they strained to conclude that petitioners did not rule out any and all productive use through further applications to reject the takings claim on the merits. Whether the property owner has pursued permissible uses to the point of ripeness must be extricated from the substantive takings analysis. The effect of the rulings below is to condemn the property owner not only to piecemeal litigation or otherwise unfair procedures in order to pinpoint just what use may be made of the affected property, which is precisely what Justice Stevens warned against in *MacDonald*, 477 U.S. at 350 & n.7, 106 S. Ct. at 2567 & n.7, 91 L. Ed. 2d 285, but also to an adverse final determination on the merits of the takings claim.

The open-ended exhaustion of uses mandated by the Pennsylvania courts also negates the futility exception recognized in the ripeness cases: on grounds of futility, a party might even bypass a permit process and go directly to court seeking judicial review of a law's constitutionality under the takings clause. For example, the permit application may not be a "viable option," *Herrington v. County of Sonoma*, 857 F.2d 567, 570 & n.2 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S. Ct. 1557, 103 L. Ed. 2d 860 (1989), or the granting authority may have dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming, *e.g.*, *Parkview Corp. v. Department of Army*, 490 F. Supp. 1278, 1282 (E.D. Wis. 1980). It is quite a strange turn to adjudicate a regulatory takings claim on the premise that the requisite finality in the permit application process has been achieved, only to reject the claim because the property owners' efforts in seeking every last permissible use are inevitably found wanting.

The Court has acknowledged that there is no precise formula for determining whether a landowner has been deprived of economically viable use of his property. Instead, the reviewing court must make "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224, 106 S. Ct. 1018, 1026, 89 L. Ed. 2d 166 (1986). The decisions of the courts below render it virtually impossible to prove a categorical regulatory taking from the denial of economically viable use of property and thereby unconstitutionally block the path to just compensation. They take the property owners' threshold requirement of obtaining from the regulating agency a "final definitive position regarding how it will apply the regulations at issue to the particular land in question," *MacDonald*, 477 U.S. at 351, 106 S. Ct. at 2568, 91 L. Ed. 2d 285, and use it as a pretext to foreclose the petitioners' takings claim on the merits. The government's similar attempts in *Loveladies Harbor*, 21 Cl. Ct. at 157-59, and *Formanek v. United States*, 26 Cl. Ct. 332 (1992) were roundly rejected. The Federal Circuit requires that the determination whether the government has taken all economically beneficial use of land be guided by its market value, if any, after the permit denial. *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1565-67 (Fed. Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995). Pennsylvania, on the other hand, insists that the property owner exhaust all manner of impossibilities. The present case begs loudly for clear guidance in resolving "the economic impact of the regulation on the claimant." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

V.

THE STATE AND FEDERAL COURTS REQUIRE CLARIFICATION WHETHER INVESTMENT-BACKED EXPECTATIONS REMAIN AS A FACTOR TO BE CONSIDERED OR ARE SUBSUMED IN A FINDING OF A CATEGORICAL TAKING.

It is somewhat unclear after *Lucas* whether the claimant's investment-backed expectations must be considered in cases of categorical takings. The Federal Circuit appeared to retain this factor as part of the takings analysis in *Loveladies Harbor,* but stated in *Florida Rock* that in such cases, *Lucas* teaches that the economic impact factor alone is determinative and no balancing of factors is required. *Florida Rock,* 18 F.3d at 1564.

Under the rubric of "traditional takings analysis" the Commonwealth Court determined that the permit denial did not interfere with investment-backed expectations because the owners did not prove what their plans were in 1963 when they purchased vacant land on a major highway. In doing so the court below nullified the legitimate expectations of the owners and utterly ignored that the restriction foreclosed development of commercially zoned property long held for investment purposes. If the Mocks' investment-backed expectations remain a factor to be considered in a categorical takings case, they are entirely consistent with the conclusion that their property has been taken by virtue of the wetlands regulation. The Commonwealth Court's rationale, which assumes that people purchase property with no thought of being rewarded, nullifies well established concepts of reasonable investment-backed expectations.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If petitioners are correct in urging that the denial of their permit application has effected a total, categorical taking, the matter should be remanded to the Pennsylvania Environmental Hearing Board for determination of just compensation for the taking.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, NOVEMBER 22, 1995

(J-171 of 1995)
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 110 E.D. Appeal Dkt. 1994

Appeal from Order of Commonwealth Court entered March 25, 1993, at No. 1153 C.D. 1992, Affirming Decision of Pennsylvania Environmental Hearing Board entered May 1, 1992, at No. 90-166-MR

Argued: October 24, 1995

MR. AND MRS. CONRAD MOCK,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER

PER CURIAM: DECIDED: November 22, 1995

Order affirmed.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Pa.R.J.A. 701(f).

Judgment entered

Appendix A

s/ John W. Person
John W. Person, Esquire
Deputy Prothonotary

APPENDIX B — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA, MARCH 25, 1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1153 C.D. 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

ORDER

NOW, March 25, 1993, the decision of the Pennsylvania Environmental Hearing Board, dated May 1, 1992, at EHB Docket No. 90-166-MR, is affirmed.

s/ David W. Craig
DAVID W. CRAIG, President Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
MAR 25 1993
s/ CR Hostutter
Deputy Prothonotary — Chief Clerk

APPENDIX C — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 25, 1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1153 C.D. 1992

ARGUED: NOVEMBER 18, 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge

OPINION BY PRESIDENT JUDGE CRAIG

FILED: March 25, 1993

Appendix C

Conrad and Barbara Mock appeal from a decision of the Pennsylvania Environmental Hearing Board, which upheld the Department of Environmental Resources' denial of the Mocks' permit to fill wetlands on their property to construct an auto repair shop, and also ruled that the department's denial did not effect an unconstitutional taking of the Mocks' property.

The Mocks do not challenge the board's determination that the department correctly denied the permit application under the applicable statutes and regulations. Therefore, the sole question for our review is whether the department's permit denial accomplished a taking, under the U.S. and Pennsylvania Constitutions, for which the Mocks must be compensated.

Because the circumstances of this case do not fall within the newly articulated categorical rule in *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992), nor do they qualify as a taking under traditional takings analysis, we hold that the board did not err in deciding that the Mocks did not suffer a unconstitutional taking when the department denied their permit application.

BACKGROUND

The relevant facts from the record are as follows. The Mocks are part-owners of a 5.2 acre tract of land in Bucks County, Pennsylvania, which they bought in 1963. The western edge of the parcel fronts along a busy road in a "C-2 Highway Commercial District" as designated by the local zoning ordinance.[1] Auto repair shops are a permitted use in the Highway

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1. Zoning Ordinance of the Township of Plumstead, July 1989, (Ordinance).

Commercial District, under section 1401a of the Ordinance. All of the parcels surrounding the Mocks' site have been developed, but the Mocks have not subdivided or developed their land since they bought it in 1963.

Of the 5.2 acres on the site, 3.94 acres are wetlands, as defined by the department's regulations at 25 Pa. Code §105.1.[2] The Mocks do not dispute the definition or delineation of the wetland areas on their property. The approximately 1 1/4 acres of non-wetlands, known as upland areas, are located in the southwest and southeast corners of the parcel, are rather steeply sloped in places, and are separated by approximately 100 feet of wetlands. A stream, Pine Run Creek, runs roughly along the northern boundary of the property.

In 1988 the Mocks applied to the department for a permit[3] to fill .87 acres of wetlands on their property, to enable them to build their proposed auto repair shop and its associated driveways and parking spaces. The department regulates activities which may affect wetlands under the provisions of the Dam Safety and Encroachments Act, (Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§693-1 - 693.27, and according to the regulations implementing the Act in 25 Pa. Code §§105.1 -105.451.

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2. Wetlands are defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas." 25 Pa. Code §105.1.

3. The Mocks submitted a Joint Permit Application to the department, one copy of which was forwarded to the U.S. Army Corps of Engineers for their evaluation of the project. However, only the department's permit denial is at issue here.

Appendix C

The department conducted a preliminary review of the Mocks' application and concluded that the project, as proposed, presented potentially significant adverse environmental impacts under the criteria listed in 25 Pa. Code §105.14(b). In a letter to the Mocks dated September 23, 1988, the department specified that the proposed project had an impact on the wetland ecology, and that the auto repair shop did not need to be built close to water, two relevant concerns under 25 Pa. Code §§105.14(b)(4) and (b)(7).

In that letter, the department also requested that the Mocks submit additional information about alternatives to the project which could reduce the adverse environmental impacts, additional information about the need for the project and its resulting public benefits, and its effect on the natural condition of the wetlands involved. The department identified these issues as necessary considerations pursuant to 25 Pa. Code §§105.15 and 105.16. As part of the preliminary review, the department also considered the recommendations of other agencies involved in granting a permit to fill wetlands, in particular, the Pennsylvania Fish Commission, the Environmental Protection Agency, and the U.S. Fish and Wildlife Service. The record reveals that all of these agencies recommended denial of the Mocks' project as proposed.

The Mocks, through their engineering consultant Russell Benner, responded to the department's preliminary review in a letter dated September 30, 1988, in which he suggested moving the location of the building, offered to maintain a buffer between the project and the wetlands through a conservation easement and by planting trees, and noted that the Mocks' plan provided for a wetland replacement area of .38 acres to compensate for the proposed filling of .87 acres. Mr. Benner also noted that he

considered the application complete at that time, and that all matters had been adequately discussed. His letter to the department stated, "[w]e will not accept the permit application being deemed incomplete in lieu of taking action on the permit request, therefore we hope that future correspondence from your office will address a conditional approval of, or a denial of the permit application."

In October 1988 the department contacted Mr. Benner to suggest that the Mocks consider limiting their construction to the uplands portion of their property. Mr. Benner responded that this proposal would require the Mocks to secure a variance from the township's setback requirements,[4] and that he would pursue that alternative. The Mocks did not submit any alternative proposals to the department.

Thereafter, the department completed its review of the Mocks' application. In a letter dated April 12, 1990, the department notified the Mocks that their application was denied. The reasons for the denial were similar to the ones the department gave in its preliminary review, namely, that the project adversely affected wetlands and wetland ecology, that the Mocks did not demonstrate that alternatives with less impact on wetlands did not exist to attain the goals of the project, and that the public benefits of the project did not outweigh the environmental harms.

The Mocks appealed the denial to the Environmental Hearing Board, arguing that the department erred in denying their permit, and that the department's action constituted a taking

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4. Section 1402b of the Ordinance specifies the minimum setback requirements for permitted uses in the C-2 District.

of their property. Before the board ruled, the department and the Mocks met to discuss possibilities for settlement. In the course of that meeting the department again suggested that the Mocks consider using only the upland portions of the property for their shop, but the Mocks rejected that idea as economically infeasible. The department also suggested using the property for a wetlands nursery, but the Mocks rejected that idea as well.

After two days of hearings, in which it took additional evidence, the board upheld the department's denial in a decision issued on May 1, 1992. After concluding that it had jurisdiction over the Mocks' appeal, the board ruled that the department correctly denied the project permit and that the denial did not constitute a taking. From the board's ruling that the department's action did not effect an unconstitutional taking, the Mocks appeal to this court.

THE ENVIRONMENTAL HEARING BOARD'S DECISION

The board's decision consisted of extensive findings of fact, discussion, and conclusions of law. Some of the facts were stipulated by the parties, describing the parcel, the project, and an earlier unsuccessful attempt by the Midas Realty Corporation to secure permission to fill wetlands on the Mocks' property to build a muffler repair shop.[5]

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5. In 1985 the Mocks entered into an Agreement of Sale with Midas Realty Corporation for $175,000, which was contingent upon Midas' ability to secure all the permits necessary to build a muffler repair shop on the property. When Midas encountered opposition to the project from the department and the Army Corps of Engineers in 1986, it abandoned the project. The design of the Mocks' project was "basically the same as the design of the Midas project." Finding of Fact No. 25.

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Based on the amount quoted in the Midas deal, Finding of Fact No. 54, which is important to deciding the takings question, states, "[t]he Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants [the Mocks], the Site could have a value of $175,000 (the amount offered by Midas) or more. . . ."

The board's discussion outlined the review procedures that the department followed in evaluating the Mocks' project.[6] As already stated, of the ten factors to be considered in evaluating projects which interfere with wetlands, the department found two to be relevant — the impact of the proposed project on the ecology of the wetlands, and the extent to which the project was water-dependent. 25 Pa. Code §§105.15(b)(4) and (b)(7). Because the department found that the project had the potential for significant environmental harm, the department then proceeded to consult with the Mocks to examine ways to reduce or eliminate the harm, pursuant to 25 Pa. Code §105.16(a), including ways to mitigate the harm.

The department defines mitigation in 25 Pa. Code §105.1 as follows:

> An action undertaken to accomplish one or more of the following purposes:
>
> (i) Minimize impacts by limiting the degree

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6. The board noted, and we note also, that Chapter 105 of 25 Pa. Code was substantially revised effective October 12, 1991. The references in the board's decision, and in ours, are to the version of the regulations in effect on April 12, 1990, when the department denied the Mocks' permit.

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or magnitude of the action and its implementation.

(ii) Rectify the impact by repairing, rehabilitating or restoring the impacted environment.

(iii) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.

(iv) If the results listed in subparagraphs (i) - (iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

In this case the department considered the Mocks' efforts to mitigate the environmental harm and concluded that, although they attempted to reduce the negative impact over time by proposing deed restrictions and a tree buffer under factor (iii), the Mocks did not adequately avoid or minimize the negative impact by considering reducing the size of the project or changing its proposed use, under factor (i). The department did not find factor (ii) applicable to the Mocks' proposal.

Further, the department continued its analysis of the Mocks' proposal to include replacement wetlands as a part of their project, according to factor (iv). The department concluded, and the board agreed, that the Mocks' creation of .38 acres of replacement wetlands did not compensate for the environmental harm caused by the loss of .87 acres of wetlands, as proposed.

The department then proceeded to the third step in its evaluation, as required by 25 Pa. Code §105.16, to weigh the public benefits against the environmental harm of the project. Of the possible benefits listed in that section of the regulations, the Mocks identified five positive effects of their project: reduction of illegal trash dumping from the roadway; elimination of erosion and sediment pollution; reduction of air pollution resulting from auto repairs; the creation of 20-30 jobs; and fulfilling a need for general auto repairs in the area.

The department ruled, and the board agreed, that the Mocks did not prove that the benefits outweighed the harms. The reduction of trash and erosion could be accomplished with minor measures if they were proven to be problematic. The other three benefits — reducing air pollution, creating jobs, and satisfying demand — were all associated with the shop itself, but were not shown to be tied in any way to the shop's location on the Mocks' land, near or on wetlands. The Mocks do not question the department's balancing of harms and benefits here on appeal.

After determining that it had jurisdiction,[7] the board concluded that the Mocks did not suffer an unconstitutional taking because the Mocks did not prove that their land was valueless after the department's permit denial. Relying on *Andrus v. Allard*, 444 U.S. 51 (1979), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), among others, the board ruled that although the department's action may prevent the Mocks from the most profitable use of their property, reduction in value is not enough to find a taking.

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7. The department had argued that the board lacked jurisdiction to consider the takings question, but revised its position on appeal to this court, stating that the board correctly determined that it had jurisdiction.

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Based on the fact that the Mocks did not consider any alternative projects or submit revised applications to the department, the board stated, "[s]ince Appellants [the Mocks] did not seek approval for a smaller facility, we cannot conclude that they will be denied any use of the wetlands." Further, the board stated that, "[c]ommon sense tells us that some of the other permitted uses do not require a 5,000 square foot building and may not require as many parking spaces."

The board was persuaded that the Mocks' investment-backed expectations were not destroyed, because they never introduced evidence of what their expectations were when they purchased the property in 1963 or afterwards, and because riparian land has been "the subject of regulation for centuries," citing *White v. Pennsylvania Railroad Co.*, 354 Pa. 397, 47 A.2d 200 (1946). The board perceived no evidence to suggest that, just because the department denied the fill permit for this particular project, it would prohibit all projects which required any filling of wetlands; thus, in the board's view, the Mocks' investment-backed expectations were not destroyed.

Within the legal framework of traditional takings analysis, the board concluded that the department's action was not an unconstitutional taking of the Mocks' property. After the board rendered its decision, the U.S. Supreme Court decided the Lucas case, on which the Mocks rely heavily to support their argument that because the department's action left their property valueless, the board erred in not finding a taking.

Our scope of review in Environmental Hearing Board decisions is to determine whether the record contains substantial evidence to support the board's findings of fact, and whether the board committed errors of law or constitutional violations.

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Willowbrook Mining Co. v. Department of Environmental Resources, 92 Pa. Commonwealth Ct. 163, 499 A.2d 2 (1985).

THE LUCAS DECISION

In *Lucas*, decided on June 29, 1992, the U.S. Supreme Court considered the appeal of an owner of beachfront property in South Carolina, who was prohibited from developing any permanent habitable structures on his land by the 1988 South Carolina Beachfront Management Act, enacted after Mr. Lucas had purchased the property. S.C. Code §§48-39-250-290 (Supp. 1990). The Beachfront Management Act directed the South Carolina Coastal Council to establish a baseline beyond which construction of habitable improvements was prohibited, for the purpose of preserving the state's beaches. No exceptions were provided in the Beachfront Management Act.[8]

After first deciding that the claim was ripe, Justice Scalia outlined the two categories of regulatory actions which would be compensable without the "case-specific inquiry into the public interest advanced in support of the restraint" that would normally be required in a traditional takings analysis. Lucas, __ U.S. at __, 112 S.Ct. at 2893. The first type involves regulations which compel a property owner to allow a physical invasion of his property. *Id.* at __, 112 S.Ct. at 2893. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Id.* at __, 112 S.Ct. at 2893.

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8. S.C. Code §§48-39-280(A) and 290(A) (Supp. 1988). In the course of Mr. Lucas' appeal, the South Carolina legislature amended the Beachfront Management Act to allow the Council to issue special construction permits in certain circumstances. S.C. Code §48-39-290(P)(1) (Supp. 1991).

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Justice Scalia distinguished between government regulation that diminishes property values and the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted. . . ." *Id.* at __, 112 S.Ct. at 2894 (emphasis in original). He stated:

> And the *functional* basis for permitting the government, by regulation, to affect property values without compensation — that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . — does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

Id. at __, 112 S.Ct. at 2984 (emphasis in original and citations omitted) (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922)).

Justice Scalia would require compensation in situations where "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . ," *Id.* at __, 112 S.Ct. at 2895 (emphasis in original), typically, as in Mr. Lucas' case, requiring land to be left in its natural state. The Court accepted the trial court's finding that Mr. Lucas' land was rendered valueless by the South Carolina law, fitting this case into the second category of takings cases described by Justice Scalia.

The Court in *Lucas* then defined circumstances where the government could avoid compensating a land owner in a

categorical taking, even where the land was deprived of all value, if the regulation in question does no more than could be accomplished under the state's nuisance laws. "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere . . . in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at __, 112 S.Ct. at 2900. Because the question of whether Mr. Lucas could have been prohibited from developing his land under existing nuisance law was not addressed below, the Supreme Court remanded the case to the South Carolina Supreme Court for consideration of that issue.

The Mocks argue that *Lucas* applies to their situation, and that the board's own findings support the conclusion that the department's action constituted a taking. First, they note that the board found that their property, in its present condition and without a permit, is essentially valueless. Finding of Fact No. 54. Second, they argue that each of the alternatives suggested by the department, namely, using the site as a wetlands nursery, and confining development to the upland areas, were economically infeasible, and the board recognized them as unreasonable options. Third, the Mocks argue that the department never substantiated that it would grant a permit to fill any portion of the wetlands. We will address their arguments in turn.

Although we find substantial evidence to support the board's finding that the Mocks' property is valueless in its present condition, that finding does not put the Mocks in the same situation as the land owner in *Lucas*. The state statute in *Lucas* prohibited all permanent development on the property in question, but the department's action with respect to the Mocks only denied the specific project under consideration. In this case,

neither the Act nor the department's regulations prohibit the filling of wetlands, nor did the department's permit denial prohibit all construction on the Mocks' land.

The import of the board's finding, that the land in its current state is valueless, is simply to state that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

In its discussion, the board accepted as reasonable the Mocks' rejection of the department's suggestion to build their shop in the southeast uplands corner of the lot, because it was objectionable from a business standpoint. According to the Mocks, if the shop was located in that corner of the lot, it would have low visibility from the highway, would be close to noise and dust from a neighboring cement plant, and would require construction of a bridge or access road to reach it, which would also require filling of wetlands.[9]

We agree with the board's determination that the proposed alternative location for the garage may be unreasonable from a business standpoint, but, again, the department's denial of this project does not foreclose other uses of the property. As the board points out, there are a variety of uses permitted in this C-2 Highway Commercial District, which may not require filling of wetlands in the same amount or location as the plan submitted by the Mocks. Section 1401a of the Ordinance permits a variety of uses in the C-2 district, including museums, libraries, hospitals,

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9. The wetland nursery option was never fully explored by the department or the board, because it "did not make sense" to the Mocks. Finding of Fact No. 49.

nursing homes, medical and other office buildings, recreational and municipal facilities, service and retail shops, and restaurants. The Mocks have not established the impossibility of using the property for service or retail shops, for example.

The Mocks next argue that the department never guaranteed that it would approve a permit to fill wetlands for an access road to reach the garage if it was moved to the uplands corner, or for any other purpose, but the record does not support this contention. Because the Mocks never submitted alternative proposals to the department, the department could only respond to questions about hypothetical situations. However, when questioned about the possibility of granting a permit to fill wetlands for an access road to reach the southeast uplands corner, Richard Shannon, a water pollution biologist for the department, testified, "I feel that a driveway construction on this property would be feasible because the impact would be minimal."

The board correctly states that the department's "action was to deny permission for Appellants [the Mocks] to proceed with a specific project design. It does not go beyond that point." Although the board did not consider *Lucas* in its evaluation, the facts and conclusions the board did make in upholding the department's action support our interpretation that the Mocks' case is distinguishable from *Lucas*. Because we find *Lucas* to be inapplicable to this case, we need not consider whether the Mocks' project would have already been prohibited under existing nuisance or property law.

TRADITIONAL TAKINGS ANALYSIS

Although we have determined that the Mocks' case is not the

extraordinary one when no economically beneficial use of land is permitted, *Lucas*, __ U.S. at __, 112 S.Ct. at 2894, we must still evaluate their situation under the principles of takings analysis established by previous court decisions. Both the Fifth Amendment to the U.S. Constitution, and Article I, section 10 of the Pennsylvania Constitution provide that private property shall not be taken for public use without just compensation.[10]

The Act and the department's regulations are exercises of the state's police power, to enact and enforce laws for the promotion of the public welfare. *Willowbrook Mining Co.*, 92 Pa. Commonwealth Ct. at 169, 499 A.2d at 5. In *Lawton v. Steele*, 152 U.S. 133 (1894), the U.S. Supreme Court provided a three-part test for the validity of a state's actions under its police power: (1) The public interest must require such interference; (2) The means chosen must be reasonably necessary for the accomplishment of the purpose; and (3) The means chosen must not be unduly oppressive on individuals. *Id.* at 137.

As the board noted in its decision, the Mocks concede that the department's action satisfies the first two prongs of *Lawton*. The Mocks never argued that the purpose of the Act was invalid, or that the Act and its implementing regulations were not tailored to meet a legitimate state purpose.[11] The Mocks argue that the

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10. U.S. Const. amend. V, and Pa. Const. art. I, §10. Because the courts of our commonwealth have interpreted the takings clause using the same framework as the federal courts, we need not pursue two separate levels of analysis here.

11. Section 693.2 of the Act, 32 P.S. §693.2, states the purposes of the Act, which are to regulate and plan dams and other water encroachments in order to protect the health, safety, and welfare of people and property, to protect the state's natural resources, and to protect navigation.

permit denial places an undue burden on them as individual property owners, according to the third prong of *Lawton*. Our court recognized that "an unconstitutional taking of private property would be unduly oppressive." *Willowbrook Mining Co.*, 92 Pa. Commonwealth Ct. at 170, 499 A.2d at 5.

Before the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the concept of a taking was generally limited to a direct physical appropriation of private property or the functional equivalent of such an ouster. *Lucas*, __ U.S. at __, 112 S.Ct. at 2892. In *Mahon*, Justice Holmes recognized the potential for a taking to occur through the operation of government regulation. He stated, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415.

Since that time, the United States Supreme Court has not decided the point at which a regulation goes too far according to any set formula, but has been guided by the facts and circumstances in each case. *Penn Central Transportation Co.*, 438 U.S. at 124. In general, compensation for a government taking will be required when "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992).

In its case-by-case, factual inquiries, the Supreme Court has identified several important factors in determining whether a regulatory taking has occurred: the type of governmental interference; the diminution of property values; and the extent to which the regulation interferes with reasonable, distinct,

investment-backed expectations. *Penn Central Transportation Co.*, 438 U.S. at 124 . We will analyze each of these factors as it relates to the Mocks' circumstances.

First, the courts have been more likely to find a taking if a regulation compels a property owner to allow a physical invasion of his property, rather than interference with its use. *Id.* at 124. Even a minimal permanent intrusion on private property has been considered a taking, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court found a regulatory taking when property owners were required to allow cable television equipment to be attached to their buildings. Because the regulation in the Mocks' case does not involve a physical interference with property, this factor does not persuade us to conclude that a taking has occurred.

When a regulation interferes with the use of property, its effect on property values is an important consideration in our analysis. Because government would cease to function if the state was compelled to compensate property owners every time a regulation diminished property value, the courts have uniformly held that diminution in property value, standing alone, cannot establish a taking; the takings issue must be resolved by focusing on the uses that the regulations permit. *Penn Central Transportation Co.*, 438 U.S. at 131.[12]

Further, a regulation does not effect a taking just because it deprives a property owner of the most valuable use of his property. *Andrus*, 444 U.S. 51.[13] Where an owner possesses a

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12. *See also Euclid v. Ambler Realty Co.*, 272 U.S- 365 (1926), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

13. *See also Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

"full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking" because the effect of the regulation must be viewed in its entirety. *Andrus*, 444 U.S. at 66. In applying these principles, the Supreme Court has sustained regulations that have resulted in large reductions in property value where the land retains significant value. *Pace Resources. Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (citing *e.g.*, *Euclid* and *Hadacheck*).

The Mocks did not present any evidence of the diminution in their property value, except to quote the amount involved in their earlier sales agreement with Midas to build a muffler shop, which fell through, and to submit a narrative appraisal report which supported that estimate. Because the Mocks focused on only two options for their land, building an auto repair shop according to their specific site plan or leaving the land undeveloped, they did not offer any testimony or evidence about the economic value of their land which could be realized through other development options.

Therefore, although we accept the board's finding that the land in its present state is essentially valueless, the Mocks failed to prove that their land lost all of its residual value when the department denied their fill permit. The Act does not compel the Mocks to leave their land in its present undeveloped state, and we must focus on the remaining uses which the regulations permit. Because there is no evidence in the record that the land cannot be put to economically viable use, this factor also weighs against finding a taking.

The third factor in our analysis involves the effect of the department's action on the Mocks' reasonable, distinct,

investment-backed expectations for their property. As stated in *Pace Resources. Inc.*, "[t]he concept of reasonable, distinct, investment-backed expectations may . . . involve a recognition of the fact that a property can have value, arising from partially executed plans for development, that is unique to its owner and not reflected in its current market value." 808 F.2d at 1032-33. However, the expectations are reasonable only if they take into account the power of the state to regulate property for the public interest, and, for a taking to occur, the regulation must have almost the same effect as the destruction of the owner's property rights. *Id.* at 1033.

We find substantial support for the board's finding that the Mocks never presented any evidence of what their plans were for their property when they bought it in 1963. The department's permit denial did not interfere with any present or past use of the property, so we must focus on what the Mocks could reasonably expect to do with their property in the future. *See Penn Central Transportation Co.*, 438 U.S. at 136.

As to the Mocks' future plans, we further agree with the board that the Mocks could not reasonably expect to develop their land free from government regulation because it is riparian land, which has been subject to regulation for centuries. *White v. Pennsylvania Railway Co.*. Not only is a large part of their parcel wetlands, which the Mocks do not contest, but it is also within the 100-year floodplain, as designated by the local zoning ordinance.

The department's action prevents the Mocks from proceeding with the development of their auto repair shop as planned, but it does not destroy the Mocks' rights to develop their property according to some alternative plan, even if that plan

involves some filling of wetlands. Thus, the Mocks' reasonable investment-backed expectations were not frustrated to the point of effecting a taking of their property.

The Mocks rely on two decisions of the U.S. Claims Court to support their takings argument, *Loveladies Harbor, Inc. v. The United States*, 21 Cl. Ct. 153 (1990), and *Formanek v. The United States*, 26 Cl. Ct. 332 (1992), but we are not bound or persuaded by these decisions. In each of these cases the landowners appealed from the Army Corps of Engineers' denial of a permit to fill wetlands, and in each instance the U.S. Claims Court found that a taking had occurred.

In *Loveladies Harbor, Inc.* the court determined that a taking occurred because of the significant diminution in property value, based on a comparison of the estimated fair market value of the land if it was fully developed for its most profitable use, to the value of the land sitting idle, which was almost zero. The court was not persuaded that the alternative uses suggested by the government had a "reasonable probability" of being successfully developed. *Loveladies Harbor, Inc.*, 21 Cl. Ct. at 159. Furthermore, the court found that the federal and state regulations in question lacked a substantial, legitimate state purpose. *Id.* at 160.

In *Formanek* the court followed the same reasoning as it did in *Loveladies*, to find that the permit denial effected a taking when the property value of the undeveloped land was substantially lower than its projected worth when fully developed. *Formanek*, 26 Cl. Ct. at 339-40. The court also found that the land owners' investment-backed expectations in their property had been frustrated by the denial. *Id.* at 340.

Appendix C

These cases are distinguishable from the Mocks' situation on several grounds. The method of comparing the fair market value of the most profitable use of the property to its market value as a completely undeveloped tract, used in *Loveladies* and *Formanek*, has not been adopted by the United States Supreme Court, and we decline to adopt it here. Because the past decisions of the Supreme Court clearly support the principle that a regulation does not effect a taking when it prevents a property owner from using his land in such a way as to generate the most profit, *e.g.*, *Andrus*, we are convinced that the method used by the Claims Court to calculate diminution in property value is in error.

Furthermore, the Mocks did not argue that the Act here lacked a legitimate public purpose, nor did they prove that their reasonable, investment-backed expectations were destroyed by the department's action, factors which were apparently present in the Claims Court's analysis in *Loveladies* and *Formanek*, respectively. Therefore, although the cases cited by the Mocks involved regulation of wetlands which did go so far as to accomplish a taking, they do not change the outcome of the case before us.

CONCLUSION

Because the department's denial of the Mocks' permit did not render the land valueless, this case does not fit the categorical rule articulated in *Lucas v. South Carolina Coastal Council*. Nor does this case satisfy any of the factors present in a traditional takings analysis, such that the state is forcing the Mocks alone to bear burdens which, in all justice and fairness, should be borne by the public as a whole. *Penn Central Transportation Co.*, 438

U.S. at 123. The department's actions here did not effect a taking of the Mocks' property for which compensation is required.

Accordingly, we affirm the board's decision.

s/ David W. Craig
DAVID W. CRAIG, President Judge

APPENDIX D — DISSENTING OPINION OF JUDGE KELLEY IN THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 25, 1993

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1153 C.D. 1992

ARGUED: November 18, 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge

DISSENTING OPINION
BY JUDGE KELLEY FILED: March 25, 1993

Appendix D

I respectfully dissent. I believe that the record and exhibits indicate clearly that the Mock property was rendered economically valueless by the denial of the permit by the Department of Environmental Resources.

The site of the property is in a commercial district fronting on a main traffic artery in Bucks County. The exhibits and testimony indicate that there was no feasible way that the property could be developed without encroaching on the wetlands. The Department of Environmental Resources determined preservation of the wetlands as justification for the denial of the permit for construction of commercial utilization of the property.

I believe therefore, that the facts of the instant case do fall within the parameters as determined by *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

I additionally find it most troubling that the Department of Environmental Resources relies upon an evaluation by the Fish Commission for its determinations. The Fish Commission language "would seem likely" as being sufficient justification to justify a negative determination is incomprehensible to me. (*See* Department of Environmental Resources Exhibit No. 27.) Such equivocal language would not support any rightful claims in law in order to sufficiently justify impeding the substantive rights of property.

I would, therefore, find sufficiency in the record that there was a taking by this determination and would accordingly so reverse.

Appendix D

s/ James R. Kelley
JAMES R. KELLEY, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
MAR 25 1993
s/ CR Hostutter
Deputy Prothonotary — Chief Clerk

APPENDIX E — COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD ADJUDICATION ISSUED MAY 1, 1992

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE FIVE
HARRISBURG, PA 17101-0105
717 787 3483
TELECOPIER 717 783 4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EHB Docket No. 90-166-MR
(consolidated)

Issued: May 1, 1992

MR. AND MRS. CONRAD MOCK

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Robert D. Myers, Member
Syllabus

Appendix E

The Board sustains DER's action in denying Appellants' application for a permit authorizing them to place fill on 0.87 acres of wetlands in order to construct an auto maintenance facility. In reaching this result, the Board concludes that Appellants did not fully consider options to reduce or eliminate the impact of their proposed project on the wetlands, that Appellants' proposal to replace the wetlands with 0.38 acres of man-made wetlands did not adequately compensate for the loss, and that the public benefits cited by Appellants did not outweigh the environmental harm. The Board also considers and rejects Appellants' claim that DER's action amounts to an unconstitutional taking of their property, ruling that investment-backed expectations in riparian land must take into account the long history of governmental regulation and the likelihood of future regulation.

Procedural History

Mr. and Mrs. Conrad Mock (Appellants) filed a Notice of Appeal on April 26, 1990 from an April 12, 1990 letter of the Department of Environmental Resources (DER) denying Appellants' Encroachment Permit Application No. E09-357 to place and maintain fill on a tract of land in Plumstead Township, Bucks County. Appellants filed a second Notice of Appeal on December 6, 1990 from DER's denial of their request for Section 401 Water Quality Certification. This appeal was docketed at 90-530-MR and, at the suggestion of the parties, was consolidated into the first appeal (90-166-MR) on January 3, 1991. On March 26, 1991 the Board approved a Partial Stipulation of Settlement that removed the Section 401 Water Quality Certification issue from the consolidated appeals.

A hearing was held in Harrisburg on July 9 and 10, 1991,

before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel and presented evidence in support of their positions. Appellants filed their post-hearing brief on August 28, 1991; DER filed its post-hearing brief on September 27, 1991. Appellants filed a reply brief on October 17, 1991.

The record consists of the pleadings, a partial stipulation of facts, a transcript of 386 pages and 46 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellants are individuals with a mailing address of 102 West Street Road, Feasterville, PA 19047-7817 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations adopted pursuant to said statutes.

3. Appellants are part owners of a 5.2-acre tract of land (Site) in Plumstead Township, Bucks County, purchased in February 1963 by Appellants and others for $9,000 (Stip.[1]; N.T. 29-31).

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1. The Partial Stipulation of Facts presented at the outset of the hearing (N.T. 3).

Appendix E

4. The Site is located along the east side of Easton Road, U.S. Route 611, L.R. 156, just north of Doylestown, Pa. in an area zoned C-2, Highway Commercial (Stip.; Appellants' Exhibit No. 11(a)).

5. Road frontage along the western (Easton Road) boundary is 267.03 feet. The rear (eastern) boundary is 587.05 feet. While the southern boundary (532 feet) is nearly at right angles with these two, the northern boundary (589.08 feet) veers to the northeast to create a tract much wider in the rear than in the front (Appellants' Exhibit No. 11(a)).

6. Pine Run Creek, flowing in a northeast-southwest direction, meanders through the site along the northern boundary and passes under a bridge located on Easton Road about 50 feet south of the northern boundary. (Appellants' Exhibit No. 11(a)).

7. Much of the Site south and southeast of Pine Run Creek is relatively flat but rises in elevation toward the southeast corner (18 feet above the creek bank) and southwest corner (8 feet above the creek bank). The entire Site is wooded. (Appellants' Exhibit No. 11(a)).

8. All of the Site is within the 100-year floodplan of Pine Run Creek except for the higher-elevation areas in the southeast and southwest corners. These upland areas amount to about 1-1/4 acres. The larger area is in the southeast corner and is separated from the smaller area in the southwest corner by about 100 feet. (Stip.; Appellants' Exhibit No. 11(a)).

9. Slopes in the southeast upland area are 10%-20% (N.T. 55).

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10. The relatively flat areas of the Site (3.94 acres) constitute wetlands (Stip; N.T. 150).

11. The land in the vicinity of the Site is highly developed with commercial and industrial establishments. These include a tire store south of the Site, a cement factory east of the Site, a medical facility north of the Site and an oil company, auto dealership and banks west of the Site (across Easton Road). The Site is the only undeveloped land in the immediate vicinity (N.T. 13, 58, 152).

12. The Site has not been occupied, subdivided or developed since Appellants purchased it. Appellants have expended some funds for the payment of taxes and for reservation of sewage connections, and have recovered some of their expenditures by selling part-interests in the Site. Because the Site is undeveloped, the portion bordering Easton Road receives a certain amount of trash tossed into it from the highway. That portion of the Site also experiences some erosion and sediment pollution from a stormwater pipe discharging into it (Stip.; N.T. 14, 28-31, 85-86, 87-88, 227-228; Appellants' Exhibits Nos. 3 and 4).

13. When the minimum yard requirements (front, side and rear), set forth in the Plumstead Township Zoning Ordinance in effect in 1988, are considered, the areas available for development purposes are reduced to 1/100 of an acre in the southwest upland and 1/10 of an acre in the southeast upland. This latter area would be increased by 2/10-3/10 of an acre under the revised yard requirements in the 1989 Zoning Ordinance (Stip.; N.T. 54-55, 100-103, 118; Appellants' Exhibits Nos. 11(a) and 12).

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14. In 1979 Appellants filed an application with DER seeking a permit authorizing the placement of a retaining wall along Pine Run Creek and the placement of fill behind it to a height above the 100-year flood elevation. This project would have filled in all of the wetlands on the Site. DER issued a letter accepting the calculations and methodology but stating that permits would not be issued until land development was imminent. No work was done on the project and no permits were ever issued (N.T. 49-52, 97-99).

15. ON December 5, 1985 Appellants entered into an Agreement of Sale with Midas Realty Corporation (Midas), agreeing to convey the Site to Midas for $175,000 but contingent on Midas' securing all necessary permits and approvals for constructing and operating a Midas Muffler Shop on the Site (N.T. 16-17, 52; Appellants' Exhibit No. 2).

16. On February 11, 1986 Midas filed with DER an application for a Water Obstruction Permit authorizing the placement of fill on a portion of the Site for the construction of a Midas Muffler Shop and parking areas (N.T. 52-53, 61-63; Appellants' Exhibits Nos. 11(a) & 13).

17. The Midas project included, *inter alia*, a strormwater detention basin and the extension of a 36-inch reinforced concrete pipe designed to carry off-site runoff to an outlet structure to be constructed in the south bank of Pine Run Creek near the Easton Road bridge (N.T. 63; Appellants' Exhibit No. 11(a)).

18. Submitted as part of the Midas application was a report containing calculations showing that stormwater runoff and 100-year floodplain elevations would not be increased by the proposed project (N.T. 64, 68-71; Appellants Exhibit No. 17).

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19. The design of the Midas project satisfied Plumstead Township's standards for stormwater management and floodplain use and Bucks County Conservation District's standards for erosion and sedimentation control (N.T. 71-73; Appellants' Exhibits Nos. 15 & 16).

20. Since the placement of the outlet structure was outside of the floodway, it qualified for a General Permit from DER. Authorization for this aspect of the project was issued by DER on April 29, 1986 (N.T. 63-64; Appellants' Exhibit No. 14).

21. After encountering opposition from officials of DER and the U.S. Army Corps of Engineers (C.O.E.) to the filling in of wetlands, Midas decided to discontinue its permit application and no DER action was ever taken with respect to it (N.T. 77-79).

22. Appellants returned Midas' downpayment and the Agreement of Sale became a nullity (N.T. 17-18).

23. After the Midas sale fell through, Appellants decided to develop the Site themselves by constructing an auto repair facility, a permitted use in the C-2, Highway Commercial District of Plumstead Township (Stip.; N.T. 18).

24. Appellants filed with DER and the C.O.E. a Joint Permit Application seeking authorization for the project. The Application was resubmitted to DER in its entirety (with additional information) on July 11, 1988 (N.T. 82-83; Appellants' Exhibit No. 20).

25. The design of Appellants' project was basically the same as the design of the Midas project. It proposed (a) the filling of 0.87 acres of wetlands, an area roughly 150 feet wide by 240

feet long lying between the two upland areas; (b) the construction of a 5,000[2] square foot building and 37 parking spaces[3] on the filled-in area; (c) the construction of a detention basin east of the parking area; and (d) the extension of the 36-inch reinforced concrete pipe and the installation of the outlet structure near Easton Road (Stip.; N.T. 19, 73-75; Appellants' Exhibit Nos. 11(b)).

26. Appellants' project also proposed a 0.38-acre wetlands replacement area to be created by Appellants in the southeast upland area. Pursuant to this proposal existing wetlands soil would be excavated (from wetland areas to be filled in) and stockpiled. The upland area would be excavated to the elevation of the adjacent wetlands area and the wetlands soil would be placed on it. Wetlands plantings — sedge, sensitive fern, common skunk cabbage, spice bush, silver maple and red ash — would be placed in the replacement area (Stip.; N.T. 75-77; Appellants' Exhibit No. 11 (b)).

27. In addition, Appellants, proposed to place a double row of conifers to separate the wetlands area from the remainder of the Site and to deed-restrict the wetlands area to prevent any future development (Appellants' Exhibit No. 20).

28. Appellants' Application contained copies of approval

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2. The testimony of Russell G. Benner, Jr. indicated the size to be about 40 feet by 100 feet (N.T. 74). This would amount to 4,000 square feet. However, the Application states 5,000 square feet and our measurements of the building as depicted on Appellants' Exhibit No. 11(b) satisfies us that 5,000 square feet is the more accurate figure.

3. Under the current zoning ordinance 51 parking spaces would be required (Stip.).

letters obtained in connection with the Midas application in 1986. See Findings of Fact Nos. 19 & 20 (Stip.; N.T. 83-84; Appellants' Exhibit No. 20).

29. Included in Appellants' Application was a Comprehensive Environmental Analysis. In this Analysis, Appellants claimed that the net loss of 0.5 acres of wetlands (13% of the total on the Site) was offset by the following public benefits:

(a) elimination of illegal dumping that takes place on the Site adjacent to Easton Road;

(b) reduction in air and noise pollution by the establishment of an auto maintenance facility specializing in replacement of mufflers and air filtration devices;

(c) elimination of erosion and sedimentation pollution from off-site surface water by carrying these flows to Pine Run Creek by extending the 36-inch reinforced concrete pipe;

(d) creation of 20-30 permanent jobs; and

(e) providing an additional auto maintenance facility convenient to the growing population of the area

(N.T. 84-89; Appellants' Exhibit No. 20).

30. Dennis Brown, a fish and wildlife biologist for the U.S. Fish and Wildlife Service, visited the Site on June 22, 1988. As a result of his observations, the Fish and Wildlife Service recommended that the C.O.E. deny Appellants' Application. The

Service's June 28, 1988 letter stated that the "filling of high quality wetlands for building and parking lot construction is clearly inconsistent with the 404(b)(1)[4] Guidelines." (Stip.; N.T. 295-298; DER's Exhibit No. 26).

31. On July 8, 1988 the U.S. Environmental Protection Agency (EPA), relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 143-144; DER's Exhibit No. 28).

32. On July 7, 1988 the Pennsylvania Fish Commission, relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 287-288; DER's Exhibit No. 27).

33. Appellants responded to the comments of the Fish and Wildlife Service, EPA, and the Pennsylvania Fish Commission in a letter to the C.O.E. dated July 26, 1988. Among the statements made in this letter, Appellants agreed to pipe waters from a spring (that would be covered with fill) from the mouth of the spring to Pine Run Creek (N.T. 92-93; Appellants' Exhibit No. 21).

34. August 19, 1988 the Pennsylvania Fish Commission, having reviewed Appellants' Application, recommended that DER deny the Application. The reviewer's comments made light of the public benefits that Appellants cited and observed that they could be provided just as easily from an alternative upland location (Stip.; N.T. 282-287; DER's Exhibit No. 29).

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4. The reference is to section 404(b)(1) of the Clean Water Act, Public Law 92-500, 82 Stat. 816, 33 U.S.C.A. §1344(b)(1).

35. The Pennsylvania Fish Commission also advised DER on the same date that Pine Run Creek is a warmwater fishery with low fishing pressure. As such, it would be used primarily as a bait fishery — providing minnows for use elsewhere (N.T. 285, 292-293; DER's Exhibit No. 29).

36. On September 23, 1988 DER notified Appellants of its concern about the impact of the proposed project on the wetlands. Appellants were instructed to provide additional information and justification with respect to 5 specific concerns related to 25 Pa. Code §105.14, §105.15 and §105.16 (N.T. 146-147; DER's Exhibit No. 4).

37. Appellants responded to DER's September 23, 1988 letter on September 30, 1988, enclosing a copy of their July 26, 1988 letter to the C.O.E. (See Finding of Fact No. 33). At the conclusion of their response, Appellants informed DER that no additional clarification of their position could be provided and that DER should take action on their Application (N.T. 89-92; Appellants' Exhibit No. 21).

38. Applications for Encroachment Permits are reviewed by DER by considering the factors listed in 25 Pa. Code §105.14(b).[5] If that review discloses the potential for significant environmental harm, then under the provisions of §105.16(a) DER consults with the applicant to examine ways to reduce or eliminate the harm. This includes consideration of mitigation measures defined in §105.1. DER also consults with other governmental agencies. If, after these consultations, DER is still

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5. Chapter 105 of the regulations was substantially revised effective October 12, 1991. The references to sections of Chapter 105 in this Adjudication are to versions in existence on April 12, 1990 when the Application was denied.

convinced that significant environmental harm will occur, then the public benefits of the project are evaluated and weighed against the environmental harm. The benefits must outweigh the harm in order to justify issuance of a permit to place fill in wetlands (N.T. 133-135).

39. Most of DER's review of Appellants' Application was performed by Roland Bergner, a water pollution biologist, but he left his position with DER prior to making a final recommendation on the Application. Richard C. Shannon, Jr., another water pollution biologist, completed the review by utilizing the material already in the file (N.T. 129, 138-139).

40. Shannon concluded that only 2 of the 10 factors listed in §105.14(b) were of concern — (a) the effect on water quality and aquatic habitat, and (b) the need to be located in close proximity to water (N.T. 159-164).

41. Having concluded that the project would involve the potential for significant environmental harm, Shannon then considered Bergner's consultations with Appellants, examining ways to reduce or eliminate the harm by utilizing mitigation measures in §105.1. Shannon concluded (a) that Appellants had not fully addressed factor (i) by considering alternative uses and alternative sites, (b) that factor (ii) was not applicable, (c) that Appellants had addressed factor (iii) by proposing a buffer zone and deed restrictions, (d) that the replacement wetlands proposed with respect to factor (iv) were not sufficient either in size or quality to be a suitable substitute, and (e) that replacement wetlands could not properly be considered, in any event, since Appellants had not adequately considered factor (i) (N.T. 166-172).

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42. Still convinced that significant environmental harm would occur, Shannon evaluated the public benefits of the project and weighed them against the environmental harm. he concluded that the benefits claimed by Appellants (Finding of Fact No. 29) were marginal at best, and not enough to outweigh the environmental harm (N.T. 173-182).

43. Shannon prepared a Record of Decision on October 27, 1989 recommending denial of the Application for three reasons:

(a) an auto repair facility is not a water dependent activity;

(b) the loss of wetlands will eliminate fish and wildlife habitat, alter flood storage capabilities and decrease water quality improvement; and

(c) the lack of any demonstrated public benefits sufficient to offset the environmental harm.

(N.T. 182; DER's Exhibit No. 7).

44. Shannon visited the Site on January 25, 1990, found the wetlands to be exceptional, in his opinion, and took a number of photographs (N.T. 149-156; DER's Exhibits Nos. 10 through 21).

45. Shannon's supervisor, Khervin D. Smith (Chief of the Environmental Review Section of the Division of Rivers and Wetland Conservation), agreed with Shannon's conclusions and recommended denial of the Application (N.T. 320, 323-325).

46. Eugene E. Counsil (Chief of the Division of Waterways

and Stormwater Management) reviewed Shannon's and Smith's recommendations, agreed with them and recommended to his superior, Joseph J. Ellam (Director, Bureau of Dams and Waterways Management), that the Application be denied (N.T. 353-354, 356-358).

47. The Application was denied in a letter dated April 12, 1990 and signed by Ellam (Stip.; N.T. 358; DER's Exhibit No. 9).

48. In August 1990 Appellants met with representatives of DER to discuss possible alternatives to the design of the project that would address DER's concerns. DER officials made two suggestions: develop the Site as a wetlands nursery; or limit commercial development to the upland area in the southeast corner of the Site with access provided from the Easton Road either by securing permission to use an existing access road on the land south of the Site or by constructing a bridge over the wetlands separating the two upland areas on the Site (N.T. 19-20, 359-360).

49. Developing the Site as a wetlands nursery did not make sense to Appellants (N.T. 20).

50. Appellants were unsuccessful in gaining permission to use the access road on the land south of the Site. Besides, they considered the idea of limiting commercial development to the uplands in the southeast corner of the Site to be unsound for the following reasons:

(a) too little visibility;

(b) too close (30-40 feet) to the noise and dust of the cement factory;

(c) too little developable space — 1/10 acre to 4/10 acre (N.T. 20-22, 38-40, 43, 56-58, 80, 118; Appellants' Exhibit No. 5).

51. Placing the proposed commercial development, as presently designed, in the southeast corner of the Site would still impact about .5-acre of wetlands (N.T. 373-379; Appellants' Exhibit No. 25).

52. Plumstead Township's Zoning Ordinance lists 25 categories of uses permitted by right in the C-2 Highway Commercial District, 3 categories of uses permitted by conditional use and 17 categories of uses permitted by special exception. The uses encompass a broad range of commercial, office and institutional activities (N.T. 60; Appellants' Exhibit No. 12).

53. Subsequent to DER's denial of their Application, Appellants sought and obtained a reduction in the assessed value of the Site for Tax purposes from $5460 to $650 (N.T. 23-25; Appellants' Exhibit No. 8).

54. The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 (the amount offered by Midas) or more (N.T. 16, 25, 80-82, 94; Appellants' Exhibit No. 9).

55. The wetlands on the Site are classified as palustrine forested wetlands with substantial areas of scrub/shrub wetlands and emergent wetlands. This diverse system provides high quality habitats for certain fish and wildlife species and is valuable for water quality improvement and flood storage (N.T. 149-157, 297).

56. Appellants' proposed project would completely destroy 0.87 acres of these wetlands, eliminating their ability to function as a habitat for fish and wildlife species and to provide water quality improvement and flood storage (N.T. 158-159).

57. Most wetlands in the Doylestown area exist along stream corridors and provide important refuges for wildlife in the midst of highly developed areas (N.T. 152, 298).

58. The wetlands on the Site are classified by the Fish and Wildlife Service as Category 2 — wetlands which are considered replaceable — rather than Category 1 — wetlands too unique to be replaced. Category 1 wetlands would all be considered "important" wetlands as defined in 25 Pa. Code §105.17(a) (N.T. 315-318).

59. DER did not treat the wetlands on the Site as "important" wetlands during its consideration of Appellants' Application. Shannon and Smith now believe that the wetlands are "important" (N.T. 183-184, 340).

DISCUSSION

Appealing from a permit denial, Appellants have the burden of proof: 25 Pa. Code §21.101(c)(1). To carry the burden, Appellants have the burden of proof: 25 Pa. Code §21.101(c)(1). To carry the burden, Appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion: 25 Pa. Code §21.101(a).

Appellants make two arguments. The first, to which they devoted most of their brief, is that DER's denial of the Application constitutes an unconstitutional taking of their

property. The second, stated as an alternative, is that the permit should have been granted. Unfortunately, they barely outline the second argument. It seems to us that, before considering whether the denial amounts to an unconstitutional taking, we need to determine whether the denial was supported by statute and regulation and was an appropriate exercise of DER's discretion.

There is no suggestion that Appellants could have proceeded with their project without a permit. Section 6(a) of the DSEA, 32 P.S. §693.6(a), mandates a permit for every water obstruction or encroachment, including the placement of fill (see definitions in §3, 32 P.S. §693.3). To be entitled to a permit, Appellants had to show compliance with the provisions of the DSEA and of the regulations adopted under it: §9(a), 32 P.S. §693.9(a). Those regulations constitute Chapter 105 of 25 Pa. Code and, more specifically, the sections on permit application processing at §105.14 and §105.16. In addition, §105.17 and §105.411(3) are potentially applicable where wetlands are involved.

The procedure to be followed in reviewing applications is set forth in §105.14 where 10 specific factors are listed for DER's consideration. Shannon found only 2 of these factors to cause concern — the effect of the project on water quality and aquatic habitat (§105.14(b)(4)), and the need for the project to be located near water (§105.14(b)(7)). Appellants made no effort to undermine or rebut Shannon's findings in this regard, and we find them to be reasonable. Obviously, these concerns involved the potential for significant environmental harm, requiring DER to proceed under §105.16(a) by consulting with Appellants and other governmental agencies.

DER held such consultations, one purpose of which was to

explore ways to reduce the potential environmental harm to a minimum. This included "mitigation", defined in §105.1 as follows:

> an action or actions undertaken to:
>
> (i) minimize impacts by limiting the degree or magnitude of the action and its implementation;
>
> (ii) rectify the impact by repairing, rehabilitating, or restoring the impacted environment;
>
> (iii) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; or
>
> (iv) if the results listed in subparagraphs (i)-(iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

DER determined that factor (ii) was inapplicable and that factor (iii) had been adequately addressed by proposals for a buffer zone and deed restriction. We need to focus only on factors (i) and (iv). Potential ways to minimize environmental impacts under factor (i) are relocating the project off-Site, confining it to the upland areas on-Site, reducing the size, or changing the use. Since an auto repair facility does not have to be located near water, it is not a use bound by its nature to a wetland environment. For this reason, there is less justification for tolerating the impact

on wetlands when a facility of this sort is proposed. DER was correct in concluding that Appellants had not given this option serious consideration.

Confining development to the upland areas was considered, however, and rejected by Appellants. Since most of the upland area is in the southeast corner of the Site, it follows that the proposed building and parking areas would have to be located there. Appellants found this objectionable from a business standpoint. First of all, the facilities would have low visibility from Easton Road — located at the rear of a wooded Site. Second, they would be too close to the noise and dust of the cement factory. DER made no effort to counter this testimony, and we will accept it as reasonable. It is also apparent that, even if the facilities were placed in the southeast corner of the Site, it would still be necessary to destroy wetlands in the course of building an access road. Appellants estimate that the impacted area — 1/2 acre — would be similar to the net impact of their project as proposed.

Nothing in the record suggests that Appellants considered reducing the size of the project or changing it to a different use.

DER maintains that, since Appellants did not fully satisfy factor (i), the proposal for replacement wetlands under factor (iv) could not technically be considered. Despite this legal position, DER reviewed the replacement proposal and found it to be inadequate because it involved the replacement of 0.87 acres of natural wetlands by only 0.38 acres of manmade wetlands. Appellants made no claim that their proposal constituted an appropriate replacement. They simply pointed out that no other space was available on the Site to construct replacement wetlands. While this certainly is true on the basis of their project

as designed; it overlooks the possibility that the proposed facility could be reduced in size and the possibility that on-Site wetlands can be supplemented by off-Site wetlands. We agree with DER that Appellants' replacement proposal does not "compensate"[6] for the environmental impact by "replacing or providing substitute resources or environments" as stated in factor (iv).

Convinced that, after considering mitigation measures, significant environmental harm would still occur, DER was required by 25 Pa. Code §105.16 to evaluate the public benefits of the proposed project and weigh them against the environmental harm. DER went through this procedure and concluded that the harm outweighed the benefits. Appellants did little to challenge this conclusion. Our review of the benefits cited by Appellants leads us to the same conclusion reached by DER. Of the 5 benefits listed, 2 pertain to the Site itself and 3 pertain to the proposed auto maintenance facility. In the former category are elimination of illegal dumping and elimination of erosion and sediment pollution. The evidence of dumping along Easton Road indicates that this is a minor matter that, if important enough, could be controlled by fencing or some other device. Similar comments can be made about erosion and sediment pollution. To the extent this is a problem, it can be corrected by extending the 36-inch reinforced concrete pipe to the creek bank — work authorized in 1986 by the General Permit issued by DER.

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6. "Compensate": to be equivalent to. Webster's Ninth New Collegiate Dictionary 1987.

"Compensation": giving an equivalent or substitute of equal value. Black's Law Dictionary, Revised Fourth Edition 1968.

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The benefits of the proposed auto maintenance facility — reduction of air pollution, creation of 20 to 30 jobs and fulfillment of a need for such facilities — would result no matter where the facility is placed. They are not site specific. Appellants have not shown that other sites suitable for this type of business do not exist in the Doylestown area and that the benefits will not occur if Appellants' Site is not used. Without such a showing, we cannot assign great weight to these 3 benefits. Even when all 5 are lumped together, they fail, in our judgment, to outweigh the environmental harm associated with the loss of wetlands in a rapidly urbanizing region of the Commonwealth.

Because the harm will outweigh the benefits, DER was prohibited by §105.16 and by §105.411(3) from issuing a permit. We find the denial to be lawful and an appropriate exercise of DER's discretion.

Before leaving this issue, however, we feel compelled to comment on DER's eleventh-hour attempt to characterize the wetlands on the Site as "important." Wetlands in this category are accorded greater protection by special criteria set forth in 25 Pa. Code §105.17. Part of this protection stems from the fact that mitigation measures (including replacement) are not considered. Appellants' Application was not reviewed under §105.17 because DER did not consider the wetlands to be "important." Shannon changed his thinking on that point sometime after his deposition on November 13, 1990 and near the end of his direct testimony at the hearing on July 9, 1991 (N.T. 188-189). There is no suggestion in DER's pre-hearing memorandum (filed April 18, 1991) or its filing in response to Pre-Hearing Order No. 2 (filed July 1, 1991) that the appeal would be defended, at least in part, on the ground that the wetlands are "important."

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Appellants made no motion to strike this part of Shannon's testimony or to contest it in any other fashion, perhaps because they viewed it as enhancing their taking claim or perhaps because their cross-examination uncovered a rationale that can only be termed sophistry. We will not burden this Adjudication with a discussion of the rationale because DER has not convinced us that the wetlands are "important." The characteristics cited by Shannon, while vital to "important" wetlands, are typical of what can be found in nearly all wetlands. Unless we are to treat all wetlands as "important," we fail to see how these characteristics should be accorded greater protection on the Site than they receive elsewhere.[7]

We now turn our attention to Appellants' claim that denial of the permit constitutes an unconstitutional taking of their property. DER asserts (for the first time in its post-hearing brief) that the Board has no jurisdiction to rule on this issue. Litigants often raise constitutional issues in proceedings before the Board and our authority to rule on them has not, to our knowledge, previously been questioned. Like all administrative agencies, we lack the power to declare a statute unconstitutional. But where a litigant concedes the constitutionality of the statute but claims that DER's manner of administering it impinges on constitutional rights or protections, we rule on such claims as a necessary part of determining whether DER acted in an unlawful manner or abused its discretion.[8] Such claims have included the

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7. We note that the "important" classification has been abandoned in the revised Chapter 105 of the regulations in favor of what appears to be a more workable distinction between those wetlands too valuable to be affected and those that are not.

8. For some representative cases, see *John R. Yenzi, Jr. v. DER*, 1988 EHB 643 (due process clause); *Chambers Development Company, Inc. et al. v. DER*, (Cont'd)

unconstitutional taking of property on at least one occasion: *Willowbrook Mining Company v. DER*, 1984 EHB 333, in which our decision was affirmed by Commonwealth Court, 92 Pa. Cmwlth. 163, 499 A.2d 2 (1985) without any suggestion that we exceeded our jurisdiction.

DER argues, however, that the Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. §1-201 *et seq.*, provides the "complete and exclusive procedure and law" applicable to the taking of property for public purposes: 26 P.S. §1-303, including *de facto* takings referred to in 26 P.S. §1-502(e). With such a statute establishing an exclusive remedy and vesting exclusive jurisdiction in the Courts of Common Pleas, DER asserts, the Board is deprived of any jurisdiction it otherwise might have to rule on such an issue.

This argument is persuasive on its face, but ignores appellate court decisions construing the Eminent Domain Code. The seminal case, *Gaebel v. Thornbury Township, Delaware County*, 8 Pa. Cmwlth. 379, 303 A.2d 57 (1973), held that a claim for *de facto* taking cannot be filed under the Eminent Domain Code where the taking involves the exercise of the police power. The property owner must first challenge the constitutionality of that exercise by the means provided by the Legislature. In the case of a zoning ordinance, as was involved there, the challenge must be made through procedures contained in the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq.*

(Cont'd)
1988 EHB 68 (commerce clause; contracts clause); and *Dale A. Torbert et al. v. DER*, 1989 EHB 834 (Fourth Amendment). Of course, the provisions of Article I, Section 27, of the Pennsylvania Constitution frequently are cited to us as they were by DER on page 54 of its post-hearing brief.

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The *Gaebel* decision was followed in a number of subsequent cases, including *Reilly v. Commonwealth, Dept. of Environmental Resources*, 37 Pa. Cmwlth. 608, 391 A.2d 56 (1978); *Kraiser v. Horsham Township*, 72 Pa. Cmwlth. 16, 455 A.2d 782 (1983); and *Merlin v. Commonwealth*, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983). Like the MPC, the DSEA represents an exercise of the Commonwealth's police power. Any claim that the exercise of that power by DER amounts to an unconstitutional taking of property must be pursued through the procedures contained in the statute — appeal to this Board: 32 P.S. §693.24(a). We clearly have the jurisdiction to consider it.

The Fifth Amendment to the U.S. Constitution and Article I, Section 10, of the Pennsylvania Constitution both prohibit the taking of property for public use without the payment of just compensation. While these protections have been enforced with little difficulty where the taking consists of actual governmental appropriation and use of the property, enforcement has proved troublesome where the taking consists of governmental regulation of the use of the property. The courts have been unsuccessful in drawing a reliable line dividing regulations that do not constitute a taking and those that do. Such boundaries as are discernible have been influenced more by the facts of each particular case than by any application of legal dogma.

State regulation is based upon the police power. In order to pass constitutional muster at the federal level, the Commonwealth's exercise of the police power through the DSEA and Chapter 105 of 25 Pa. Code must satisfy the three-prong test articulated by the U.S. Supreme Court in *Lawton v. Steele*, 152 U.S. 133 (1894). Thus, (1) the interests of the public must require it, (2) the means chosen must be reasonably necessary for the accomplishment of the purpose, and (3) the

means chosen must not be unduly oppressive upon individuals. Appellants concede that the first two prongs have been satisfied and maintain that only the third prong is in issue. They claim that their property is rendered valueless by the denial of their permit application, causing them a loss of at least $175,000, and placing upon them an unduly oppressive burden which they are being forced to bear alone for the public benefit.

To constitute a taking, a regulation must deprive the owner of *any* reasonable use of the property. If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: *Andrus v. Allard*, 444 U.S. 51 (1979), or results in a significant reduction in value: *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In considering Appellants' contention that DER's action has deprived them of any reasonable use of the Site, it is important to note that DER's action has not interfered in any manner with the present and historical use of the Site. That is significant: *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), because it focuses attention solely on Appellants' investment-backed expectations for prospective use.

There is no evidence of what Appellants' intentions were when they purchased the Site in 1963. Since they never put the place to any use, it is reasonable to assume that they intended from the start to develop it for some commercial, residential or other purpose. The nature of the Site should have made it apparent to them at the outset that development would necessitate filling in some or all of the wetlands. Being able to do this was absolutely essential to realizing their investment expectations; and yet, they never possessed absolute freedom to go ahead with it.

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The Site is riparian land — the subject of regulation for centuries. Even at common law, the owner of such land could not place obstructions on it without regard to the interests of others: *White v. Pennsylvania R. Co.*, 354 Pa. 397, 47 A.2d 200 (1946). Statutory law has regulated it in Pennsylvania at least since 1913 when the predecessor to the DSEA was enacted (see Act of June 25, 1913, P.L. 555, now repealed). Appellants' investment-backed expectations had to take into account the possibility that land already subject to long-standing regulation might have additional restrictions imposed upon it: *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (U.S.C.A., 3d Cir., 1987). "One buys land as it is . . . ," *Helms v. Zeitzeff*, 407 Pa. 482, 181 A.2d 277 at 278 (1962). They could not realistically be confident that they would be able to place fill on the Site — especially in areas within the 100-year floodplain.[9]

To the extent Appellants' investment-backed expectation relied upon the placement of fill for commercial, residential or institutional development it was too speculative to be given the constitutional protection Appellants seek. It follows that even the complete destruction of that expectation by government regulation cannot be considered a taking. We are not convinced, however, that a complete destruction has been demonstrated.

DER's action was to deny permission for Appellants to proceed with a specific project design. It does not go beyond that point. A wide variety of uses are allowed in the C-2, Highway Commercial District (see Finding of Fact No. 52). Appellants'

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9. Our conclusion here remains despite Appellants' 1979 application for a permit to build a retaining wall and place fill behind it. Although Appellants assert some DER acceptance of the idea, no approval was given and no permits were issued.

engineer concluded that none of these uses would have a lesser impact upon the wetlands. While this conclusion was not challenged by DER, we are unwilling to accept it without knowing the details on which it is based. Common sense tells us that some of the other permitted uses do not require a 5,000 square foot building and may not require as many parking spaces. Any reduction in size would almost certainly involve a reduction in the amount of wetlands to be affected, perhaps inducing DER to issue a permit. Since Appellants did not seek approval for a smaller facility, we cannot conclude that they will be denied any use of the wetlands: *Penn Central Transportation Co. v. New York City, supra.*

We conclude that DER's action is not unduly oppressive upon Appellants and that, therefore, the third prong of the *Lawton v. Steele* test is fulfilled. This exercise of the police power is constitutional.

In reaching this conclusion, we have cited and relied primarily on cases construing the Fifth Amendment to the U.S. Constitution. We have done so because the Pennsylvania Appellate Court decisions construing Article I, Section 10, of the Pennsylvania Constitution have consistently followed the federal cases. We have reviewed the Pennsylvania Supreme Court's recent decision in *United Artists Theater Circuit v. City of Philadelphia*, __ Pa. __, 595 A.2d 6 (1991), which appeared to depart from this tradition. We are satisfied that it does not affect our holding. Accordingly, both the U.S. and Pennsylvania Constitutions support the action challenged in this appeal.

Appendix E

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the consolidated appeal.

2. Appellants have the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying Appellants' Application.

3. Appellants did not fully satisfy factor (i) in the definition of "mitigation" in 25 Pa. Code §105.1 by considering options to minimize or eliminate the impact of their proposed project on the wetlands.

4. Appellants' proposal for replacement wetlands did not satisfy factor (iv) in the definition of "mitigation" in 25 Pa. Code §105.1 because its size and quality did not compensate for the impact of their proposed project on the wetlands.

5. The public benefits cited by Appellants for their proposed project did not outweigh the environmental harm of destroying 0.87 acres of wetlands and eliminating their capacity to function as a fish and wildlife habitat and to provide water quality improvement and flood storage.

6. DER was prohibited by 25 Pa. Code §105.16 and §105.411(3) from approving Appellants' application and issuing a permit.

7. The wetlands on the Site are not "important" wetlands as defined in 25 Pa. Code §105.17.

8. The Board has jurisdiction to rule on Appellants' claim

that DER's denial of their Application amounts to an unconstitutional taking of their property.

9. DER's action was not an unconstitutional taking of Appellants' property.

10. DER's action was lawful and an appropriate exercise of discretion.

ORDER

AND NOW, this 1st day of May, 1992, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

s/ Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

s/ Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

s/ Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

Appendix E

Board Member Terrance J. Fitzpatrick has a concurring opinion which is attached.

DATED: May 1, 1992

cc: Bureau of Litigation
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeast Region
For the Appellant:
Jonathan E. Rinde, Esq.
Joseph M. Manko, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

sb

APPENDIX F — COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, CONCURRING OPINION OF BOARD MEMBER TERRANCE J. FITZPATRICK ISSUED MAY 1, 1992

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE FIVE
HARRISBURG, PA 17101-0105
717 787 3483
TELECOPIER 717 783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EHB Docket No. 90-166-MR
(consolidated)

Issued: May 1, 1992

MR. AND MRS. CONRAD MOCK

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

CONCURRING OPINION OF BOARD MEMBER TERRANCE J. FITZPATRICK

I agree with the conclusions and the reasoning in the board's Opinion. I file this Concurring Opinion only to add a comment of

my own regarding the takings issue. The U.S. Supreme Court has recognized that in deciding whether a taking has occurred, it is necessary to weigh the public and private interests involved. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 492 (1987). In cases such as the present one, where a landowner's use of his property has been restricted pursuant to laws designed to protect the environment, I believe it is necessary to remember that we are dealing with land. While land is a form of property, it differs from buildings, bank notes, and automobiles in that all forms of life are biologically dependent upon it. It does not bode well for the future if we insist on treating land as if it were nothing more than an economic commodity.[1]

In my view, when a person asserts that his land has been taken due to environmental restrictions, he should face a heavier burden than in other types of takings cases.

ENVIRONMENTAL HEARING BOARD

s/ Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge Member

DATED: MAY 1, 1992

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeast Region

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1. See the discussion of the "land ethic" in Aldo Leopold, "A Sand County Almanac" (Oxford Univ. Press, 1987) pp. 201-226.

Appendix F

For Appellant:
Jonathan E. Rinde, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

jm

APPENDIX G — LETTER OF JOSEPH J. ELLAM, ACTING DIRECTOR, BUREAU OF DAMS AND WATERWAY MANAGEMENT, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, DENYING PERMIT APPLICATION No. E 09-357 DATED APRIL 12, 1990

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Post Office Box 8554
Harrisburg, Pennsylvania 17105-8554
April 12, 1990

717-541-7900

Bureau of Dams and Waterway Management

CERTIFIED MAIL NO. P 899 341 595

Mr. and Mr. Conrad Mock
102 West Street Road
Feasterville, PA 19047-7817

Re: Encroachment Permit Application
DER File No. E 09-357

Dear Mr. and Mrs. Mock:

Please accept this letter as the Commonwealth of Pennsylvania, Department of Environmental Resources' response to your Permit Application No. E 09-357 to place and maintain fill on approximately 0.87 acres of wetlands in Plumstead Township, Bucks County. The purpose of the proposed fill is for site development to facilitate the construction

of an auto maintenance facility on property owned by you. Your permit application and the documents you submitted subsequent thereto are herby incorporated by reference into this notice as if set forth in full.

A review of your application has been completed by the Department based upon the requirements of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P S. Section 691.1 *et seq.*; the Pennsylvania Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. Section 693.1, *et seq.*, and upon Chapter 105 of the Commonwealth's Regulations, 25 Pa. Code Chapter 105. Based upon that review, your permit application is hereby denied for the following reasons:

1. A review of the site and plans filed with the application confirmed that the area proposed to fill constitutes a wetland as that term is defined in 25 Pa. Code Section 105.1.

2. Your application does not adequately address the impact of the proposed fill upon the regimen and ecology of the body of water, water quality, streamflow, fish and wildlife and aquatic habitat, as required by 25 Pa. Code Section 105.14(b)(4).

3. Your application does not demonstrate that other alternatives do not exist to attain the proposed project purpose with those alternatives lessening the adverse impact to the wetland in question, as required by 25 Pa. Code Section 105.14(b)(7).

4. Your application does not demonstrate that the public benefit of the proposed project outweigh the harm to the

environment and public natural resources, as required by 25 Pa. Code Section 105.14(b). Consequently, the Department may not approve the application to discharge fill material into the wetland according to 25 Pa. Code Section 105.411(3).

In summary, based upon the Department's review of your application, the materials submitted with it, and the criteria set forth in the above cited regulations, the Department finds the proposed fill would result in destruction of aquatic habitat which would not be outweighed by a countervailing public benefit. For these reasons, your application for a permit is hereby denied.

This action of the Department may be appealable to the Environmental Hearing Board, 101 South Second Street, Suites 3-5, Harrisburg, PA 17101, (717-787-3483) by any aggrieved person pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies Or the appeal form and regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

Sincerely,

s/ Joseph J. Ellam
Joseph J. Ellam, P.E.
Acting Director
Bureau of Dams and Waterway Management
Department of Environmental Resources